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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS PEREZ, Defendant and Appellant.	F056872 (Super. Ct. No. F08903984) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. James Petrucelli, Judge.

Kieran D.C. Manjarrez, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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Following a jury trial, Juan Carlos Perez (appellant) was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] but acquitted of second degree robbery (§ 211). The trial court sentenced appellant to the middle term of three years in state prison.

On appeal, appellant contends: (1) the trial court failed to give a sua sponte unanimity instruction; (2) the trial court failed to instruct on the lesser included offense of brandishing a deadly weapon; (3) the instruction defining assault with a deadly weapon was erroneous and ambiguous; (4) the court abused its discretion in denying appellant's motion to reduce the offense to a misdemeanor; (5) the court abused its discretion in failing to impose the lower term; and (6) defense counsel was ineffective for failing to request a limiting instruction. We disagree and affirm.

FACTS

In June of 2008, Fernando Quezada and a friend drove to "Tent City" on G Street in Fresno to look for another friend, Felipe Arrellano. Quezada eventually found Arrellano. As Quezada and Arrellano talked, appellant approached and asked Quezada for money. Appellant got mad when Quezada ignored him and grabbed and pulled a gold chain and pendant from Quezada's neck. The chain and pendant fell to the ground. Appellant picked up the chain, but not the pendant, and ran into one of the tents.

Appellant returned within seconds, carrying a metal baseball bat. Appellant had the bat in the air and was swinging it. Appellant then tried to remove a bracelet from Quezada's wrist, but Quezada pulled his arm away from appellant. Quezada was afraid that appellant would hit him in the head with the bat. Quezada walked backwards away from appellant while he pretended to call 911. While doing so, he did not take his eyes off appellant and the bat. Appellant told Quezada to drop the phone. When a police officer arrived, Quezada tossed the phone.

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[1]All further statutory references are to the Penal Code unless otherwise stated.

Officer Sylvia Martinez arrived at the scene in response to a motorist who informed her that there was a "guy trying to hit another guy with a baseball bat." Officer Martinez saw appellant swinging a baseball bat at a group of three individuals. She saw one individual, Quezada, toss an object, which appellant caught. When Martinez stopped her patrol car, appellant started to walk away while holding the bat in one hand and what was later determined to be a cell phone in the other. Other officers arrived and Martinez arrested appellant, who smelled of alcohol. While in custody, appellant threatened Quezada by mentioning "Salvatruchas," a reference to a Central American gang. Quezada and the officer looked for the missing chain, but did not find it.

Officer Martinez noticed that appellant had red food coloring on his fingers, and the same red coloring was on Quezada's shirt, from "right below his collar" to "about right-mid chest," consistent with an "index, middle, and ring finger." Martinez described Quezada as in "shock" and acting "like the typical victim." Once in the patrol car, Martinez read appellant his rights, which appellant waived. But before he could give a statement, appellant "passed out."

Appellant's defense was that Arrellano had been aggressive with him in the past, and, and on the day in question, after Quezada arrived, Arrellano yelled at him and told him to "come here and let's fix this problem that we have." Appellant became "frightened" and grabbed a baseball bat to "defend" himself. He denied threatening Quezada or taking his chain, his bracelet, or demanding his phone. Instead, he claimed Quezada threw the phone at him.

DISCUSSION

1. Unanimity Instructions

Appellant asserts that the trial court erred by failing to give a sua sponte unanimity instruction because the prosecution presented evidence of multiple acts which could have supported his assault with a deadly weapon conviction. We disagree.

"Defendants in criminal cases have a constitutional right to a unanimous jury verdict." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) When a defendant is charged with a single criminal act, but the evidence reveals more than one instance of the charged crime, either the prosecution must select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that the defendant committed the same specific criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) If the prosecution does not make a selection, the court has a sua sponte duty to give an instruction along the lines of Judicial Council of California Criminal Jury Instructions (2009) CALCRIM No. 3500, stating that the jury must unanimously agree upon the act or acts constituting the crime. (*Russo,* at p. 1132.) CALCRIM No. 3500 provides in pertinent part: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing the defendant committed one act and others believing the defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916.)

Appellant argues that there were a number of acts which could have served as the basis of the assault with a deadly weapon charge: his act of grabbing the chain from Quezada's neck; his conduct with the baseball bat; his act of trying to pull the bracelet from Quezada's wrist while holding the bat; and the evidence of food coloring on Quezada's shirt, which could suggest another basis for the assault.[2] We find no error.

[2]The actual charge was assault with "a deadly weapon, to wit, a Baseball Bat." But neither party has informed us or provided a record showing whether the actual charge was read to the jury.

First, we question appellant's basic premise—that there was evidence of more than one act to support conviction on the charged crime. At most, what appellant describes as the other acts appear to constitute simple assaults. Both the charged crime and the conviction, however, were for assault with a deadly weapon. No unanimity instruction is required unless evidence of more than one act that could constitute the offense has been presented. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1454 [other act fell outside the temporal parameters of charged crime].)

Second, as for appellant's argument that the assault with a deadly weapon could have been either the act of swinging the bat or the swinging of the bat while trying to pull Quezada's bracelet from his wrist, no unanimity instruction was required. Such instruction is not "required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them.' [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

Finally, CALCRIM No. 3500, by its own terms, states that it applies where the "People have presented evidence of more than one act to prove that the defendant" committed the charged crime. Here, the prosecutor presented evidence of only one act "to prove that" appellant committed an assault with a deadly weapon. Throughout the case, the prosecutor made explicit and quite clear his election to rely on the evidence relating to appellant's use of the baseball bat as proof of the charged assault. The evidence showed that the act of pulling the chain from Quezada's neck (which presumably was when the food coloring was transferred to Quezada's shirt) was committed before appellant retrieved the bat, and was presented as the basis for the charge of robbery. In these circumstances, no unanimity instruction was required. (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292; *People v. Mayer* (2003) 108 Cal.App.4th 403, 418-419; *People v. Hawkins*, *supra*, 98 Cal.App.4th at pp. 1454-1455.)

We reject appellant's assertion of error.

2. Instruction on Brandishing a Deadly Weapon

At defense counsel's oral request, the trial court instructed the jury, pursuant to the charge of assault with a deadly weapon allegation, on the lesser included offense of simple assault, as proscribed in section 240. Appellant did not request any other instructions on lesser included or related offenses. Appellant now contends that the trial court erred when it failed to instruct, sua sponte, on brandishing a deadly weapon, as proscribed in section 417, subdivision (a)(1),[3] as a lesser included offense. We disagree.

> "The definition of a lesser necessarily included offense is technical and relatively clear. Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118, fn. omitted (*Birks*).)

In other words, "[a]n offense is lesser included to a greater offense if the greater offense cannot be committed without also committing the lesser offense. [Citations.]" (*People v. Steele* (2000) 83 Cal.App.4th 212, 217 (*Steele*). A trial court "must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citations.]" (*Birks*, *supra*, at p. 118.) But a trial court is not required to instruct on a lesser related offense. (*Steele*, *supra*, at p. 217.)

Here, the trial court instructed the jury on assault with a deadly weapon, as charged in count 2, pursuant to CALCRIM No. 875. Notes following the instruction explain that, while assault is a lesser included offense, "[a] misdemeanor brandishing of a

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[3]Section 417, subdivision (a)(1) provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a deadly weapon other than a firearm in any fight or quarrel is guilty of a misdemeanor …." Subdivision (a)(2) mirrors subdivision (a)(1) but prohibits drawing or exhibiting "any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner …."

weapon or firearm under … section 417 is not a lesser and necessarily included offense of assault with a deadly weapon. [Citations.]" (Judicial Council of Cal. Crim. Jury Instns. (Fall 2008) Bench Notes to CALCRIM No. 875, citing *People v. Escarcega* (1974) 43 Cal.App.3d 391, 398 (*Escarcega*) and *Steele*, *supra*, 83 Cal.App.4th at pp. 218, 221.) This comment is in line with a lengthy list of intermediate appellate courts in this state that have consistently regarded brandishing as a lesser related, not a lesser included, offense of assault with a deadly weapon. (See *Steele*, *supra*, at p. 218 and cases cited therein.) *Steele* observed that the reason for this rule is that "it is theoretically possible to assault someone with a [deadly weapon] without exhibiting the [deadly weapon] in a rude, angry or threatening manner, e.g., firing or pointing it from concealment, or behind the victim's back." (*Id.* at p. 218, citing *Escarcega, supra*, at p. 398.)

Appellant acknowledges *Steele*, but argues we must ignore this well-settled law because it is in conflict with the California Supreme Court's opinion in *People v. Wilson* (1967) 66 Cal.2d 749 (*Wilson*), which impliedly held that brandishing a firearm is a necessarily included lesser offense. In *Wilson*, the court reversed a conviction due to the absence of an instruction on the offense of brandishing when "the evidence would have justified the conclusion that defendant committed a violation of [section 417] rather than the assault found. [Citation.]" (*Id.* at p. 764.) Citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, appellant insists we are bound to follow the Supreme Court decision and reverse his conviction for assault with a deadly weapon.

But *Steele* cogently explains why the precedents cited by appellant in *Wilson* should not be followed. (*Steele*, *supra*, 83 Cal.App.4th at pp. 219-221.) While noting the Supreme Court's statements in *Wilson* "implied—but did not directly hold—that brandishing was a lesser included offense to assault with a firearm" (*Steele*, at p. 219), the *Steele* court declined to follow this implied holding for several reasons. First, the court cited, with apparent approval, a discussion of the subject in *Escarcega*, *supra*, 43 Cal.App.3d at pages 399-400 wherein the appellate court did not follow *Wilson* because:

> "a. The Supreme Court did not specifically state that brandishing was a lesser included offense to assault with a firearm. [¶] b. The court did not discuss the rationale behind lesser included offenses. [¶] c. The court did not overrule the prior published appellate court decisions holding that brandishing was *not* a lesser included offense to assault with a firearm. [¶] d. After publication of *Wilson*, the Supreme Court has consistently reaffirmed the principle that a lesser and necessarily included offense is one that *must* be committed in order to commit the greater offense. (The *Escarcega* court noted that it was possible to commit an assault with a firearm without brandishing it, therefore brandishing cannot be a lesser included offense to such an assault.) [¶] e. *Wilson* is not supported by any prior or subsequent cases, as [*People v.*] *Carmen* [(1951) 36 Cal.2d 768] did not so hold …." (*Steele*, *supra*, 83 Cal.App.4th at p. 220.)

To this list, the *Steele* court added its own criticism: "[I]n *Wilson*, the Supreme Court failed to follow its own rule, i.e., that the determination of whether an offense is lesser included is made from the language of the statute or the information, and not from the evidence adduced at trial. [Citation.]" (*Steele*, *supra*, 83 Cal.App.4th at p. 221.)

We agree with the *Steele* court's conclusions, including its important observation that the court in *Wilson* failed to follow its own rule for analysis of lesser included offenses later reiterated in *Birks*, *supra*, 19 Cal.4th at page 117. Thus, we follow *Steele* and the other appellate cases that have concluded that brandishing is not a lesser necessarily included offense of assault with a deadly weapon upon which a trial court has a duty to instruct sua sponte. (*Steele*, *supra*, 83 Cal.App.4th at pp. 218-220; *Birks*, *supra*, at pp. 128, 132, 134, 136, fn. 19; *People v. Kraft* (2000) 23 Cal.4th 978, 1064-1065.) Looking only at the language of the statutes and the information, as we must (see *Birks* at p. 117), "the conclusion is inescapable that an assault with a [deadly weapon] may be committed without the defendant brandishing such weapon. Ergo, under the Supreme Court's own rule of analysis, as … affirmed in *Birks*, brandishing cannot be a lesser included offense to assault with a [deadly weapon]." (*Steele*, *supra*, at p. 221.)

Because brandishing a deadly weapon, a baseball bat, is not a lesser included offense of assault with a deadly weapon, the trial court was under no duty sua sponte to instruct on brandishing.

3. Instruction on Assault with a Deadly Weapon

Appellant contends that the trial court erroneously instructed on the crime of assault with a deadly weapon. We disagree.

The trial court instructed the jury on the crime of assault with a deadly weapon, pursuant to CALCRIM No. 875, in pertinent part, as follows:

> "[Appellant] is charged in Count 2 with assault with a deadly weapon, in violation of … section 245. To prove [appellant] is guilty of this crime, the People must prove that, one, *[appellant] did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person,* and [two,] *when [appellant] acted, he had the present ability to apply force with a deadly weapon to a person,* and [three], [appellant] did not act in self-defense or in defense of someone else. [¶] … [¶] The terms application of force and applied force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude and angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. The touching can be done indirectly by causing an object to touch the other person. [¶] *The People are not required to prove that [appellant] actually touched someone*." (Italics added.)

Appellant argues that the instruction given was erroneous because it "incorrectly told the jury that an assault included a battery." We disagree.

An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) What appellant clearly ignores is the language emphasized with italics in this quotation from the instruction given—to wit, that, to prove an assault, the jury must find that the defendant did an act that would likely result in an application of force, that he had the ability to apply the force, but that no actual touching was required to find the defendant guilty of an assault. "The correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Burgener* (1986) 41 Cal.3d 505, 538-539, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756.)

We discern nothing erroneous in the instruction given and reject appellant's argument to the contrary.

4. Failure to Reduce Conviction to Misdemeanor

Appellant contends that the trial court abused its discretion in denying his motion to reduce his felony conviction for assault with a deadly weapon to a misdemeanor pursuant to section 17, subdivision (b). We disagree.

Following appellant's conviction, trial counsel filed a motion for a new trial. The date for sentencing was continued on one occasion so that counsel could prepare and file that motion. At the subsequent sentencing hearing, counsel offered to withdraw the new trial motion if the court would "consider" reducing appellant's conviction to a misdemeanor pursuant to section 17, subdivision (b). Counsel argued that appellant was highly intoxicated when he swung the bat and that he never made contact with anyone. The prosecutor objected, noting that, had the officer not arrived at the scene, it was likely appellant would have injured Quezada. The court denied the motion, stating:

> "Unless you have some authority to present to the Court, I think your motion is untimely. I have a jury verdict and certainly there was no motion to set aside the verdict, and I think a 17(b) motion would be inappropriate, if nothing else for timeliness, but certainly if it is timely, I haven't researched that issue. The Court would not grant that motion."

Section 17 differentiates felonies from misdemeanors and enumerates the circumstances in which offenses otherwise considered felonies may be reduced to misdemeanors. Assault with a deadly weapon is a so-called "wobbler" offense (§ 245, subd. (a)(1)), and subdivision (b)(1) of section 17 provides that, when a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor "[a]fter a judgment imposing a punishment other than imprisonment in the state prison." Thus, we agree with both parties that the motion was not untimely.

But we do not agree with appellant that the trial court was under the erroneous assumption that it lacked discretion. Instead, because the court indicated that it would not grant the motion even if it was timely, we consider whether the trial court abused its discretion in denying the motion.

A trial court's discretion to reduce a current felony conviction to a misdemeanor for sentencing purposes is limited. "The determination to reduce a wobbler under section 17, [subdivision](b) 'can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced ….' [Citations.]" (*People v. Superior Court* (*Alvarez)* (1997) 14 Cal.4th 968, 980.) These include the defendant's criminal history as well as "'the nature and circumstances of the [current] offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.]" (*Id.* at p. 978.) On appeal, we review the trial court's determination not to reduce a wobbler to a misdemeanor for an abuse of discretion. (*Id.* at pp. 977-978.)

Appellant contends that, because the trial court indicated "in formulaic fashion that it would not grant the motion in any event," its refusal to hear and consider arguments on the merits "cannot be regarded as a substantive and proper exercise of discretion." But the trial court did, albeit briefly, hear and consider argument on the merits. Defense counsel argued that the felony should be reduced to a misdemeanor because appellant was highly intoxicated when he swung the bat and that he never made contact with anyone. The prosecutor objected, noting that, had the officer not arrived at the scene, it was likely appellant would have injured Quezada.

In addition, the trial court, when sentencing appellant soon after denying the motion, stated that it had read and considered appellant's probation report. Appellant's criminal history was limited, consisting of an outstanding warrant issued in another state in 2006 for failing to appear on a charge of disturbing the peace. But, as noted by the probation officer, the 2006 charge and the current offense both involved instances in

which appellant was drunk at the time, although appellant himself denied having a problem with alcohol. As stated by the court at sentencing, appellant's "continued use of alcohol and failure to realize its effects on his behavior" contributed to the court's finding that he was a danger to society. Finally, the trial court presided over the trial and was aware of appellant's demeanor.

Taken all together, the trial court essentially found that appellant's offense was too serious to grant his motion. The court's comments as a whole make it clear that it did consider appellant's criminal history, the nature and circumstance of the current offense, his appreciation of and attitude toward the offense, and his traits or characteristics as evidenced by his behavior and demeanor at trial. There is no suggestion in our record that the trial court did not consider the factors set forth in argument on the motion, and appellant has not shown that the court's denial of his motion was arbitrary or irrational. We will therefore not set it aside. (*People v. Superior Court* (*Alvarez), supra,* 14 Cal.4th at pp. 977-978.) "Whatever conclusions other reasonable minds might draw, on balance we find the decision tolerable given the court's broad latitude." (*Id.* at p. 981, fn. omitted.)

5. Imposition of the Middle Term

The trial court sentenced appellant to the middle term of three years. Appellant now contends that the trial court abused its discretion in doing so, because it failed to take into consideration four factors in mitigation. We disagree.

It is well established that sentencing courts have wide discretion in weighing aggravating and mitigating factors, and the court's decision must be affirmed on appeal unless there is a clear showing that the sentence choice was arbitrary or irrational. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) Although a trial court's discretion is broad, it must exercise its sentencing discretion in a manner that is "consistent with the letter and spirit of the law, and that is based on an 'individualized consideration of the

offense, the offender, and public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

> "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831.)

In this case, the sentencing court is bound by section 1170, which provides in pertinent parts that:

> "(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court.… In determining the appropriate term, the court may consider the record in the case, the probation officer's report, … and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which the sentence is imposed under any provision of law.… [¶] (c) The court shall state the reasons for its sentence choice on the record at the time of sentencing." (See Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007).)

In the instant case, the probation report noted no factors in aggravation or mitigation relating to the crime. As to facts relating to appellant, the probation officer noted in aggravation that appellant engaged in violent conduct, indicating "a serious danger to society." In mitigation, the probation officer noted appellant had an insignificant record of criminal conduct. The probation officer recommended against probation because appellant was homeless, had no attachments to the community, and had no family support. The probation officer also noted that appellant, whose prior and current run-ins with the law both involved intoxication, did not acknowledge his alcohol problem. Finding the aggravating factor of engaging in violent behavior "balanced" by the mitigating factor of appellant's minimal criminal conduct, the probation officer recommended denial of probation and imposition of the three-year middle term.

At the sentencing hearing, defense counsel requested that the trial court consider the lower term because this was appellant's "first felony conviction" and he "never made contact with the victim with the bat." The prosecution objected, again noting the officer's presence at the scene kept appellant from injuring Quezada.

The trial court agreed with the probation officer that appellant's violent behavior making him a danger to society was an applicable aggravating circumstance, as evidenced by appellant's "continued use of alcohol and failure to realize its effects on his behavior." The court found appellant's insignificant criminal history to be a mitigating factor. The court then imposed the middle term.

Appellant now contends that the trial court failed to consider the following mitigating factors: his intoxication at the time of his current crime; the fact that Quezada "had a hand in initiating or provoking the incident"; that appellant offered no resistance to the arresting officer; and that he was homeless, which is the reason he claims he was denied probation.

We find appellant's argument unavailing. There is no need to consider intoxication as a circumstance in mitigation where, as here, it has simply provided the defendant with continuing incentive or excuse to commit crimes. (*People v. Reyes* (1987) 195 Cal.App.3d 957, 964.) The jury's rejection of appellant's self-defense claim suggests that it also rejected any testimony that Quezada provoked him. And Officer Martinez's testimony showed that appellant did not surrender while offering no resistance. Instead, appellant continued to smirk, smile, and laugh while he walked away from the officer, despite her order that he drop the bat. Appellant did not submit until additional officers arrived at the scene. Finally, as for appellant's claim that he was denied probation because he was homeless, he was presumptively ineligible for probation because he used a deadly weapon during his crime, and no unusual circumstances overriding that situation existed. (§ 1203, subd. (e)(2).)

The trial court's ruling is entitled to the presumption of correctness. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) Here, the sentencing court could conclude that the mitigating circumstance that appellant had a minimal criminal record was balanced by the aggravating circumstance that appellant's violent behavior made him a danger to society. In fact, even if the court considered several other mitigating circumstances, the result may not have been any different. "One aggravating factor can outweigh several mitigating circumstances." (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) The court's imposition of the middle term was not outside the bounds of reason, and thus there was no abuse of discretion.

6. Ineffective Assistance of Counsel

Finally, appellant contends he received ineffective assistance of counsel for counsel's failure to request a limiting instruction. We find no prejudice.

Prior to trial, defense counsel filed a motion to exclude any evidence that someone told Officer Martinez "'there's a guy hitting another guy with a baseball bat!'" Counsel asserted such evidence would be hearsay under Evidence Code section 1200 and it would be highly prejudicial. The prosecution explained that it wished to offer the evidence, not for the truth of the matter, but because it established why the officer responded to the scene. After some discussion, the trial court agreed to sanitize the statement "to the extent that it will only be that the witness, complaining witness, if you will, in that situation contacted the officer and stated that there's a guy swinging a bat back there at another guy …."

Subsequently at trial, Officer Martinez testified that she was sitting in her patrol car when a vehicle drove up next to her, and the man in the vehicle pointed behind him and shouted "[T]here's a guy trying to hit another guy with a baseball bat." Martinez subsequently clarified that the man said, "[T]here's one guy swinging a bat at another guy down there." In response to the man's statement, Martinez said she drove to the scene, arrived "[w]ithin seconds," and saw appellant advancing toward Quezada and two

others, all of whom were facing appellant, while swinging the bat at Quezada. Quezada and the two others were backing away from appellant, with their hands up.

In closing argument, the prosecutor repeated Officer Martinez's testimony: "She's just up the block … and this passing motorist … says, there's a guy swinging a baseball bat at another guy." Following appellant's conviction, defense counsel filed a motion for new trial, alleging that the trial court erroneously admitted the evidence regarding what the passing motorist told the officer. The motion also alleged that the trial court erred by giving a jury instruction on the limited purpose of certain evidence in general, but failed to instruct that the "hearsay statement delivered by Officer Martinez was not for the truth of the matter asserted." The motion alleged that the statement was particularly harmful because it had appellant swinging the bat at only one person and not the group, which undermined appellant's claim of self-defense.

Following argument by the parties, the trial court denied the motion and ruled that, "[o]n reflection," the contested statement was not relevant or admissible other than for the truth of the matter asserted, and that defense counsel erred in failing to request a limiting instruction, but that no "miscarriage of justice" had occurred.

Appellant now contends that trial counsel's failure to request a limiting instruction amounted to ineffective assistance of counsel.

"There are two components to an ineffective assistance of counsel claim: deficient performance of counsel and prejudice to the petitioner." (*In re Cox* (2003) 30 Cal.4th 974, 1019.) To prevail on the claim, the defendant must show both elements. (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93; *In re Resendiz* (2001) 25 Cal.4th 230, 239.)

"The first prong, deficient performance, is established if the record demonstrates that counsel's performance fell below an objective standard of reasonableness under the prevailing norms of practice." (*In re Alvernaz* (1992) 2 Cal.4th 924, 937; see *People v. Benavides, supra*, 35 Cal.4th at p. 93.) In assessing performance, courts must indulge a "strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) "On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.)

The second prong, prejudice, requires proof of a reasonable probability that the result would have been different in the absence of counsel's incompetence. (*People v. Benavides*, *supra*, 35 Cal.4th at p. 93.) Prejudice must be established as a demonstrable reality and not mere speculation. (*In re Cox*, *supra*, 30 Cal.4th at p. 1016.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa*, *supra*, 144 Cal.App.4th at p. 1008.)

The two elements of the claim are independent. For that reason, we need not discuss whether counsel's performance was deficient if we discern no reasonable probability of an adverse effect on the outcome. (*In re Cox*, *supra*, 30 Cal.4th at pp. 1019-1020; *People v. Mesa*, *supra*, 144 Cal.App.4th at p. 1008.)

In this case we may dispose of appellant's claim based solely on the question of prejudice. Thus, "we need not grade counsel's performance" because we conclude that appellant "was not prejudiced by counsel's alleged deficiencies." (*In re Cox*, *supra*, 30 Cal.4th at p. 1020.) As we now explain, we discern no reasonable probability of a different outcome had appellant's trial counsel requested an instruction limiting the use of the motorist's statement to explain the officer's subsequent conduct.

Officer Martinez testified that, while she was sitting in her patrol car, a car drove up next to her. The man in the car pointed behind him and shouted, "[T]here's a guy trying to hit another guy with a baseball bat," or "[T]here's one guy swinging a bat at another guy." In response, Martinez turned her car around and drove to the area the man had pointed at. She arrived at the scene "[w]ithin seconds" and saw "four subjects in the

middle of the street." Three of those persons were standing "parallel right next to each other," and the fourth, appellant, was facing them while "swinging" a baseball bat back and forth. At one point, appellant brought the bat up and "looked as though he was trying to strike Mr. Quezada's head." Appellant was "taking steps forward towards" Quezada, while Quezada and the other two persons walked backwards with their hands up.

The motorist's statement gave no more information to the jury than did Officer Martinez's testimony about her own observations, which were made within seconds of the motorist's statement. For this reason, we see no prejudice from counsel's failure to request a limiting instruction on the use of the motorist's statement.

We reject appellant's claim that he was denied effective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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LEVY, Acting P.J.

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KANE, J.